Before the
Federal Communications Commission
Washington, D.C. 20554

In the matter of	)	
	)	
Sirius Satellite Radio Inc	)	
	)	File No. SAT-MOD-199981211-00099
Application to Modify Authorization	)	Fee Control No. 0107038345114001
To Launch and Operate a Non-Geostationary	)	
Satellite DARS System	)	

MEMORANDUM OPINION AND ORDER

Adopted: June 13, 2003 **Released:** June 19, 2003

By the Commission

1. This memorandum opinion and order denies the Application for Review filed March 15, 2002 by Sirius Satellite Radio Inc and its subsidiary Satellite CD Radio, Inc (Sirius). Sirius seeks review of the Managing Director's letter ruling rejecting Sirius's "Petition for Waiver of Application Fee" in connection with modification of Sirius's space station license.

BACKGROUND

2 The Commission adopted rules for the satellite digital audio radio service ("SDARS") in 1997 At that time the Commission authorized Sirius to launch and operate a two-satellite geostationary satellite (GSO) system to provide such radio service *See Satellite CD Radio Inc.*, 13 FCC Rcd 7971 (1997) Thereafter, in an order released March 9, 2001, the International Bureau (IB) granted Sirius's application to modify its license to increase the number of satellites to three and to launch a three-satellite, non-geostationary orbit (NGSO) system in order to offer better quality service *See Sirius Satellite Radio Inc.*, 16 FCC Rcd 5419 (IB 2001) [1] IB determined, however, that Sirius had not submitted the appropriate fee with its application and, pursuant to Section 1 1116(b) of the Commission's rules, 47 C F R. § 1 1116(b),[2] it directed Sirius to pay the

[1] Sirius filed the application December 11, 1998 It launched all three of its satellites pursuant to special temporary authority granted by the Bureau December 20, 1999. *Id.* at 5420 n 4

[2] Section 1 1116(b) provides in pertinent part

> Applications or filings accompanied by insufficient fees or no fees which are inadvertently forwarded to Commission staff for substantive review will be billed

fee for authority to launch and operate an NGSO system. On June 4, 2001, the Office of Managing Director (OMD) issued Sirius a Bill For Collection in the amount of $286,095, which represented the difference between the $308,105 fee for authority to launch and operate an NGSO system and the $22,010 fee for modification of an NGSO system paid by Sirius *See* 47 C F.R. § 1.1107(10).

3. At the same time as it paid the amount billed on July 2, 2001, almost four months after IB's decision, Sirius filed a petition for waiver or, if appropriate, reconsideration, and refund with OMD It argued that it was unlawful for the Commission to charge an initial launch and operate fee when granting permission to modify an existing license, that the fee was excessive in relation to the cost of processing the application, and that a waiver would be consistent with precedent. OMD denied Sirius's request principally on the ground that Sirius was re-arguing issues already resolved by IB for which Sirius had not sought timely reconsideration or filed a timely application for review with the Commission. To the extent portions of Sirius's petition properly raised fee waiver matters within OMD's authority, it also found Sirius's allegations with regard to processing costs and Commission precedent to be without merit.

4 In its Application for Review Sirius argues that OMD erred in refusing to reconsider the appropriateness of the launch and operate fee. First, it contends that the Commission's rules delegate exclusive authority to issue fee determinations and to reconsider them to OMD, not IB, and that OMD made its fee determination in this case in its June 4, 2001 billing. Sirius argues that it thereupon properly sought reconsideration of that ruling in a timely filed waiver request after it paid the disputed fee, in accordance with Section 1.1118(b) of the rules, 47 C.F R. § 1 1118(b)[3] This rule, Sirius maintains, did not allow it to challenge the fee earlier by seeking reconsideration of IB's order because it did not yet know the amount due and thus could not pay and at the same time preserve its right to reconsideration until it was billed by OMD. Second, Sirius asserts that its application was miscategorized because it did not seek or receive new authority to launch and operate, but only a modification of its license. Sirius contends that both its application and IB's order expressly describe and treat the application as one to modify Sirius's space station authorization Moreover, Sirius maintains, it was too late to apply for authority to launch and operate a new SDARS system because the auction that selected the SDARS licensees was completed in 1997 Finally, Sirius argues that even if the Commission concludes that the launch and operate fee applies to Sirius's application, good cause exists for a fee waiver because of unusual circumstances. Specifically Sirius asserts that the Commission has never before considered an application to modify a GSO system to an NGSO system, and the fee rules do not directly address this situation Sirius concludes that a waiver is also warranted in order to avoid putting it at a competitive disadvantage.

DISCUSSION

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for the amount due if the discrepancy is not discovered until after 30 calendar days from the receipt of the application or filing at the Commission.

[3] Section 1.1118(b) states in pertinent part that.

> Actions taken by Financial Operations staff are subject to the reconsideration and review provisions of §§ 1 106 and 1.115 of this part, EXCEPT THAT reconsideration and/or review will only be available where the applicant has made the full and proper payment of the underlying fee as required by this subpart

5 We conclude that the Managing Director correctly denied Sirius's waiver request. To begin with, we affirm OMD's principal conclusion that Sirius's claim that the Commission could not lawfully impose the fee was an untimely and misdirected effort to re-argue or appeal IB's decision Sirius does not dispute that it did not seek reconsideration of IB's order or file for Commission review within thirty days, as required by our rules. *See* 47 C.F.R. §§ 1.106(f); 1 115(d) It argues, however, that the relevant fee ruling was made subsequently by OMD and that IB lacked authority to decide this matter. We disagree with Sirius's analysis for a number of reasons.

6 First, Sirius's characterization of IB's fee ruling as "preliminary" and "thus, not ripe for reconsideration" (Application for Review at 8 n. 23) is erroneous. As OMD noted, the issue was squarely presented to the Bureau by the parties. XM Satellite Radio, Inc., the other SDARS licensee, filed comments with IB challenging Sirius's fee submission, and Sirius responded. The Bureau directly addressed the parties' arguments at ¶¶ 23-24 of its order, where it explained the reasons for its fee determination, and specifically ordered compliance by Sirius at ¶ 35.[4]

7 Second, OMD's subsequent issuance of a Bill For Collection was not a fee ruling, as Sirius describes it Rather, presentation of the actual bill was a ministerial act implementing the Bureau's prior decision OMD's Bill thus referenced the Bureau's order and expressly stated "In the course of reviewing the application and comments filed in the proceeding, it was determined [by IB] that Sirius had filed the incorrect fee." Accordingly, as provided by 47 C.F.R. § 1.1116(b), OMD remitted a bill for the amount due. Moreover, despite its contention otherwise, Sirius could have readily ascertained the amount it owed earlier from IB's order by subtracting the payment it had submitted with its application from the correct fee specified in 47 C F.R § 1.1107(10). Therefore, Sirius was not precluded from taking timely action by 47 C.F.R. § 1 1118(b) [5]

[4] We also disagree with Sirius that XM's comments were procedurally improper (Application for Review at 3-4) because they violated the requirement of 47 C.F.R. § 1.1117(c) that requests for fee determinations be "filed as a separate pleading" and directed "to the attention of the Managing Director." This language was added to Section 1.1117(c) in 2001, *see Assessment and Collection of Regulatory Fees for Fiscal Year 2001*, 16 FCC Rcd 13525, 13537 ¶ 40 (2001), two years after XM's comments were filed IB also had full authority to rule on this matter and to consider the views of the parties in doing so *See* 47 C.F.R. § 0 261(a)(4) (IB delegation includes "without limitation" specific authority "to act upon applications for international and domestic satellite systems and earth stations"). Moreover, in this regard, an integral element in IB's evaluation of the application is its determination whether the applicant did, in fact, tender the appropriate fee *See* 47 C F R. § 25 110(f) ("Each [satellite] application shall be accompanied by the appropriate fee, specified by, and submitted in accordance with, subpart G of part 1 of this chapter.") In any event, if Sirius believed that IB's action exceeded its delegated authority, the proper course was to seek timely reconsideration or review of IB's decision, not to seek a new ruling from OMD.

[5] Sirius's assertion that it could not anticipate whether OMD would impose a late penalty is of no moment because 47 C.F.R § 1 1118(b) only requires full payment of the "underlying fee" before an applicant may seek reconsideration of actions taken by Financial Operations staff.

8 Additionally, notwithstanding its insistence that OMD should have considered the merits of its waiver petition, we agree that, for the most part, Sirius's arguments were a belated challenge to IB's prior conclusion regarding the proper fee category To the extent that Sirius presented arguments that properly could be deemed a request for waiver, those matters were addressed by OMD. In sum, we agree with OMD that much of Sirius's petition was an untimely attempt to further contest a final Bureau order concerning the proper fee payment by seeking a new ruling from OMD on the same question.

9 Even if Sirius had filed a timely application for review of IB's order, however, we would have affirmed IB's fee determination. The Bureau's order stated that "because this [application] is Sirius's first request to construct, launch, and operate an NGSO system, it is appropriate that Sirius should pay the application fee for such a system" *Sirius Satellite Radio Inc.*, 16 FCC Rcd at 5428 ¶ 24 We agree. It was erroneous for Sirius to pay the fee for modification of an NGSO system with its application because, as explained below, it had not previously been authorized to launch and operate an NGSO system.

10 In 1997 the Commission granted Sirius a license to construct, launch, and operate an SDARS system consisting of two geostationary satellites. Sirius's assertion that the Bureau only granted a modification of that license is technically correct under Section 309 of the Act. But for the first time, as IB correctly held, Sirius also sought and was granted authority to launch three satellites into non-geostationary orbits, which properly placed it in the specific fee category governing authority to launch and operate an NGSO system *See* Section 1 1107(10) (application for authority to launch and operate per system of technically identical [NGSO] satellites) The application at issue did not "modify" either the GSO system previously approved or a previously approved NGSO system (as contemplated under the statutory fee provisions governing modification of these two types of satellite systems), but asked the Commission to approve an entirely new NGSO system, wholly different in its technical and operational aspects

11. We perceive no unfairness in the Bureau's decision to consider this an NGSO application under the fee rules and its decision is fully consistent with the language and policy of the statutory and rule provisions governing fees.[6] As to waiver issues, it is not surprising, given the relatively short history of this service and small number of licensees, that this situation is unusual if not unique, as Sirius asserts, but this alone does not provide good cause for a waiver. *See Establishment of a Fee Collection* Program, 2 FCC Rcd 947, 958 ¶ 70 (1987) (Commission construes waiver authority narrowly and requires showing of "extraordinary and compelling circumstances"). Nor can we accept Sirius's argument that it should not have to pay the correct fee associated with its application because this will assertedly advantage its competitor. We collect fees based on a schedule established by Congress to recover a portion of the expenses we incur in processing applications These fees are incidental to system implementation and, as a practical matter, are unlikely to affect marketplace competition. All licensees incur fee-filing expenses. Sirius is no exception Moreover, our fee structure is designed such that all licensees who build a particular type of satellite system pay the same fee

[6] *See* 47 U S.C § 158(g) (Schedule of Application Fees, Common Carrier Services, Item 22); 47 C F R § 1.1107(10) The OMD decision noted, for example, that:

> [T]he work of reviewing the modification included substantial international coordination, the overall effort of which was comparable to efforts expended in the review of entirely new applications.

12 In this case, Sirius could have avoided the additional fees associated with NGSO systems by continuing to pursue its originally proposed GSO system configuration. Instead, Sirius chose to pursue a new system configuration and, as a result, incurred additional fees consistent with the obligation imposed on other NGSO applicants Absent such treatment, licensees would have every incentive to apply for the system with the smallest fees and then "modify" for another small fee in order to avoid the expense of applying for the more expensive system in the first instance. That is the competitive and public policy harm we seek to avoid here. We note that Sirius paid only $39,600 when it filed its original geostationary application on May 18, 1990 Three days later, the statutory fee schedule for geostationary systems was changed to $72,030 per satellite (as opposed to the $19,800 per satellite paid by Sirius). *See Establishment of a Fee Collection Program to Implement the Provisions of the Omnibus Budget Reconciliation Act of 1989,* 5 FCC Rcd 3559, 3631 (1990) A separate fee category for LEO satellites was enacted in 1993, which provided for a fee of $210,000 to launch and operate NGSO systems *See Revised Fees Established Pursuant to the Telecommunications Authorization Act of* 1992, 8 FCC Rcd 903, 905 (1993). Thus, we do not think that Sirius has suffered any unique competitive disadvantage as a result of its fee payment; other satellite applicants may have suffered similar disadvantages resulting from changes in the statutory fee schedule and matters of timing. Each applicant is expected to pay the statutory filing fee appropriate to the type of application at issue In short, we agree with OMD that Sirius's arguments do not justify a fee waiver

13 ACCORDINGLY, IT IS ORDERED That the application for review filed March 15, 2002 by Sirius Satellite Radio Inc. and its subsidiary Satellite CD Radio, Inc. IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H Dortch
Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of:	
Sirius Satellite Radio Inc.	File No. SAT-MOD-19981211-00099
Application to Modify Authorization to Launch and Operate a Digital Audio Radio Satellite Service in the 2320.0-2332.5 MHz Frequency Band	

APPLICATION FOR REVIEW

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March 15, 2002

EXECUTIVE SUMMARY

In this Application for Review, Sirius requests that the Commission reconsider or waive the fee determination made by the Office of the Managing Director that the launch and operate fee applies to Sirius' application to modify its space station constellation.

In 1998, Sirius sought the International Bureau's permission to modify its licensed satellite digital audio radio service ("satellite DARS") system by placing three satellites in elliptical, inclined, geosynchronous rather than geostationary orbit. Following an improperly filed request by Sirius' competitor, XM Radio Inc., the International Bureau granted Sirius' technical modifications in a March 9, 2001 order in which it opined that Sirius paid the wrong application fee and properly referred the matter to the OMD for resolution under Section 1.1116(b). Nearly three months later, the OMD, the sole FCC entity with delegated authority to rule on the fee issue raised by XM, issued Sirius a bill for the launch and operate fee, offset by the previous modification fee payment. Pursuant to Section 1.1117 of the rules, Sirius requested that the OMD reconsider or waive this fee determination. Rather than do so, however, the OMD concluded that Sirius' request was an untimely attempt to reconsider the International Bureau's order. Thus, without considering the bulk of Sirius' arguments of improper fee categorization, the OMD denied Sirius' waiver request.

The Commission should reconsider the appropriateness of the fee imposed on Sirius' application. The OMD has exclusive authority to make fee determinations, and to reconsider them, and cannot delegate such responsibility to the International Bureau. The OMD's decision also is contrary to the FCC's Rules requiring separation of substantive issues and fee determinations in application processing. Moreover, the OMD's absurd interpretation of the rules, holding that Sirius had to seek reconsideration of the fee before the OMD had determined

the fee amount, would prevent any applicant from seeking reconsideration of a fee decision. It would create a "Catch 22" situation because: (1) the rules do not permit requests for reconsideration absent payment of the underlying fee; and (2) that fee amount was not known until the OMD took action well after expiration of the thirty day window to request reconsideration of the International Bureau order.

To rectify this procedural error, the Commission should reconsider and reverse assessment of the launch and operate fee on the Sirius application. Sirius neither sought nor received new authority to launch and operate. To the contrary, the evidence establishes that a "modification" took place, including: (1) Sirius' specific request "to modify" its license; (2) the FCC's file number (*i.e.*, SAT-MOD...); (3) the standard of review applied by the International Bureau; (4) the International Bureau's unambiguous conclusion that "the public interest is served by granting Sirius authority *to modify* its satellite system"; and (5) the continuation of the milestone schedule imposed in the original 1997 license. Thus, the Commission should reconsider the appropriateness of the "launch and operate" fee to Sirius.

Alternatively, the Commission should waive this fee given the extraordinary circumstances present here. The Commission has never before considered an application to modify a GSO system to a NGSO system, and Sirius' modification did not request a "low Earth orbit" system as the OMD concluded. At most, the fee statute simply does not cover this situation. Moreover, Sirius' modified satellite DARS system will offer substantial public interest benefits and the fair and consistent application of the Commission's fee rules will be promoted by avoiding disparate impact on and relative advantage to competing applicants.

Accordingly, Sirius respectfully requests reconsideration or waiver of the OMD's fee determination and a refund in the amount of $286,095.00.

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of: **Sirius Satellite Radio Inc.** Application to Modify Authorization to Launch and Operate a Digital Audio Radio Satellite Service in the 2320.0-2332.5 MHz Frequency Band	File No. SAT-MOD-19981211-00099

APPLICATION FOR REVIEW

Sirius Satellite Radio Inc. and its subsidiary Satellite CD Radio, Inc. ("Sirius"), by its attorneys and pursuant to Sections 1.115 and 1.1117 of the Federal Communications Commission's Rules, submit this Application for Review of the Office of Managing Director's letter decision released February 13, 2002 ("*OMD Reconsideration/Waiver Denial*").[1] This decision denied Sirius' July 2, 2001 petition for reconsideration or waiver ("*Petition*")[2] of an OMD fee determination and invoice dated June 4, 2001, which assessed Sirius $286,095.00 for "authority to launch and operate" a low-Earth-orbit ("LEO") satellite system ("*OMD Fee Determination*").[3]

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[1] Letter from Mark A. Reger, Chief Financial Officer, FCC to Carl R. Frank (dated Feb. 13, 2002) ("*OMD Reconsideration/Waiver Denial*").

[2] Sirius Satellite Radio Inc., Petition for Waiver of Application Fee, Fee Control Number 0107038345114001 (dated July 2, 2001) ("*Petition*").

[3] *See* Federal Communications Commission Bill for Collection to Sirius Satellite Radio Inc., Bill Number CLW-01-00001 (dated June 4, 2001) ("*OMD Fee Determination*").

I. QUESTIONS PRESENTED

Whether the OMD acted in conflict with Sections 1.1117 and 1.1118 of the Commission's Rules, 47 C.F.R. §§ 1.1117 and 1.1118, and thereby caused prejudicial procedural error in refusing to reconsider its fee determination of June 4, 2001?

Whether the OMD acted in conflict with statute, regulation, case precedent, or established Commission policy in determining (or deferring to an *ultra vires* International Bureau determination) that Sirius should pay the fee to launch and operate a LEO space station system and whether such action involved a question of law or policy that has not previously been resolved by the Commission?

Whether the OMD acted in conflict with statute, regulation, case precedent, or established Commission policy in failing to grant Sirius a waiver of the fee to launch and operate a LEO space station system and whether such action involved a question of law or policy that has not previously been resolved by the Commission?

II. BACKGROUND

The Commission granted Sirius authority to launch and operate a satellite DARS system in the 2320.0-2332.5 MHz band following Sirius' winning bid of more than $83 million at a 1997 spectrum auction.[4] This license authorized Sirius to use two geostationary satellite orbit ("GSO") space stations. In 1998, Sirius requested FCC permission to "modify" its prior satellite system license by launching its ground spare to place three space stations in elliptical, inclined,

[4] *FCC Announces Auction Winners for Digital Audio Radio Service*, 12 FCC Rcd 18727 (1997) (Public Notice); *Satellite CD Radio, Inc.*, 13 FCC Rcd 7971 (1997) (Order and Authorization) ("*Sirius Order and Authorization*") *modified Sirius Satellite Radio Inc. for Minor Modification of License to Construct, Launch, and Operate a Non-Geostationary Satellite Digital Audio Radio Service System*, File No. SAT-MOD-19981211-00099, 16 FCC Rcd 5419 (2001) (Order and Authorization) ("*Modification Order*").

geosynchronous rather than geostationary orbit.[5] At that time, and consistent with the Commission's statutory delegation of authority, the FCC's Rules designated, *inter alia*, the following schedule of charges for applications:

Space Stations (Geostationary):
- a. Application for Authority to Launch & Operate ($89,460.00)...
- c. Modification ($6,390.00)

Space Stations (Low-Earth Orbit Satellite Systems):
- a. Application for Authority to Launch and Operate ($308,105.00)...
- c. Modification ($22,010.00)[6]

When the *Sirius Modification Application* was filed, Sirius already held a license to launch and operate a satellite DARS system. Sirius therefore sought a modification of its existing license and not a new license to launch and operate a satellite DARS system. At the time of the filing, the only modification categories available were GSO and LEO. Neither of these labels accurately describe Sirius' proposed inclined, elliptical, geosynchronous orbit. In good faith, Sirius paid the higher modification fee for a LEO satellite system.

During the International Bureau's substantive review of the *Sirius Modification Application*, XM Radio Inc. ("XM"), the other licensed satellite DARS provider and its competitor, filed comments advocating that Sirius should pay the $308,105.00 fee for an entirely new license for authority to launch and operate a LEO satellite DARS system.[7] Notwithstanding the fact that such comments were procedurally improper as contrary to Section 1.1117 of the

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[5] *Application of Satellite CD Radio, Inc. to Modify Authorization*, File No. SAT-MOD-19981211-00099 at 1 (Dec. 11, 1998) ("*Sirius Modification Application*").

[6] 47 C.F.R. §§ 1.1107 9(a)(i), 9(c), 10 (a), and 10 (c) (1998); 47 U.S.C. § 158. Sirius' application was filed on December 11, 1998 and therefore the billing rate is based on fees applicable at that time.

[7] *Comments of XM Satellite Radio Inc.* at 6-7 (filed Feb. 8, 1999).

rules,[8] Sirius explained in response that its application sought to modify its existing authority to launch and operate a satellite DARS system and thus payment of a modification fee was appropriate under the Commission's Rules.[9] Sirius pointed out that neither the modification fee category for "Space Stations (Geostationary)" nor the category for "Space Stations (Low-Earth Satellite Systems)" clearly fit the elliptical, inclined, geosynchronous satellite system proposed in the *Sirius Modification Application*, but that it paid what, in good faith, it believed to be the most directly applicable fee.[10]

In the March 9, 2001 *Modification Order* authorizing Sirius to place three space stations in a highly elliptical orbit, the International Bureau opined that Sirius should have submitted with its application the "fee applicable for applications to launch and operate new NGSO systems"[11]—a fee designation that did not even exist at the time Sirius' application was filed.[12] The order properly indicated that the OMD, as the only entity with delegated authority to rule on the fee issue raised by XM, would act pursuant to Section 1.1116(b) of the Commission's Rules to resolve this discrepancy.[13]

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8 Section 1.1117 of the FCC's Rules required fee determination requests to be filed with the OMD. 47 C.F.R. § 1.1117(c) ("Petitions for waivers, deferrals, *fee determinations*, reconsiderations and applications for review will be acted upon by the Managing Director with the concurrence of the General Counsel. *All such filings within the scope of the fee rules shall be filed as a separate pleading and clearly marked to the attention of the Managing Director.* Any such request that is not filed as a separate pleading will not be considered by the Commission.") (emphasis added).

9 *Satellite CD Radio, Inc. Consolidated Response to Comments* at 7-9 (Feb. 23, 1999).

10 *Id.* at 8-9.

11 *Modification Order*, 16 FCC Rcd at 5428.

12 In August 2000 (after Sirius' application for modification was filed), the FCC changed the LEO fee designation to a non-geostationary satellite orbit ("NGSO") fee designation without explanation. *See Amendment of the Schedule of Application Fees Set Forth in Sections 1.1102 through 1.1107 of the Commission's Rules*, 15 FCC Rcd 17615 (2000) (Order).

13 *Modification Order*, 16 FCC Rcd at 5428.

On June 4, 2001, the OMD took such action; it issued Sirius a bill for $286,095.00, representing the 1998 LEO "authority to launch and operate" fee less the 1998 LEO "modification" fee paid earlier by Sirius.[14] Prior to the due date specified on the bill, as required by Section 1.1117(e) and 1.1118(b) of the Commission's Rules and pursuant to discussions with International Bureau staff,[15] Sirius submitted to the OMD an FCC Form 159, a check in the amount of $286,095.00, and a request that the OMD reconsider its assessment of the launch and operate fee on the *Sirius Modification Application* or waive its application in this case.[16]

The OMD denied Sirius' *Petition* in the *OMD Fee Determination* on February 13, 2002. First, the OMD refused to reconsider its fee determination on the merits, characterizing Sirius' *Petition* as an untimely attempt to obtain reconsideration of the International Bureau order that had indicated that the OMD would make a fee determination and issue Sirius a bill. Second, after thereby rejecting the majority of the arguments in Sirius' *Petition* without substantive consideration, the OMD found the remaining arguments did not justify a waiver. Sirius now seeks Commission review of those determinations.

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14 *See OMD Fee Determination.*

15 Prior to filing its petition, Sirius met with International Bureau staff, who confirmed that a petition to the OMD following receipt of the OMD's bill would be an appropriate mechanism to challenge assessment of the launch and operate fee.

16 47 C.F.R. § 1.1117(e) (2000) ("Applicants seeking waivers must submit the request for waiver with the application or filing, required fee and FCC Form 159."); 47 C.F.R. §1.1118(b) ("[R]econsideration or review will only be available where the applicant has made the full and proper payment of the underlying fee...").

For ease of reference, the timeline of events is as follows:

- March 9, 2001: International Bureau issues *Modification Order*
- April 9, 2001: Deadline to file for reconsideration of *Modification Order*
- June 4, 2001: OMD issues *OMD Fee Determination*
- July 2, 2001: Sirius files *Petition*, along with Form 159 and check for $286,095.00
- July 5, 2001: Deadline to pay fee under *OMD Fee Determination*[17]

III. THE OMD ERRED IN REFUSING TO RECONSIDER THE APPROPRIATENESS OF THE LAUNCH AND OPERATE FEE

The OMD erred in refusing to reconsider the appropriateness of the launch and operate fee. OMD was the proper forum for Sirius' *Petition*, and the petition was timely filed. Furthermore, this application raises an issue of first impression of the appropriate fee for an application to modify a GSO system to a NGSO system that is not addressed by the fee statute or rules. The OMD should have addressed this question on the merits rather than dismiss Sirius' *Petition* on erroneous and prejudicial procedural grounds.[18]

A. The OMD was the Proper Forum for Reconsideration

As an initial matter, the Commission's Rules delegate exclusive authority to make fee determinations to the OMD. Section 0.231(a) of the Commission's Rules explicitly states:

> The Managing Director, or his designee, upon securing concurrence of the General Counsel, is delegated authority to act upon requests for waiver, reduction or deferment of fees, establish payment dates, and issue notices proposing amendments or adjustments to the fee schedules . . . .[19]

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[17] The OMD Fee Determination indicated that the total amount was due by July 4, 2001. Because July 4, 2001 was a federal holiday, the filing date for the fee and any petition therefore was tolled to the next day, July 5, 2001. 47 C.F.R. § 1.4(j).

[18] 47 C.F.R. § 1.115(b)(2)(v).

[19] 47 C.F.R. § 0.231(a).

The International Bureau, in its *Modification Order*, recognized this authority when it referred the *Sirius Modification Application* for OMD action under Section 1.1116(b) of the rules.[20] That section reads, in pertinent part:

> Applications or filings accompanied by insufficient fees or no fees which are inadvertently forwarded to Commission staff for substantive review will be billed for the amount due if the discrepancy is not discovered until after 30 calendar days from the receipt of the application or filing at the Commission.[21]

The *OMD Fee Determination*, issued close to three months after the *Modification Order*, constituted the exercise of authority under Sections 1.1117(c) and 1.1116(b) to determine fees after substantive grant of an application. The OMD determined not to assess a fee penalty as allowed by Section 1.1116(b) and to offset the initial modification fee of $22,010 paid by Sirius against the fee to launch and operate a LEO system. Pursuant to this fee determination, the OMD issued Sirius a bill for $286,095.00.

Sirius properly sought reconsideration of the *OMD Fee Determination* by filing a petition with the OMD as provided for in Section 1.1117 of the FCC's Rules. Section 1.111(c) unequivocally states:

> Petitions for waivers, deferrals, fee determinations, reconsiderations and applications for review will be acted upon by the Managing Director with the concurrence of the General Counsel. All such filings within the scope of the fee rules shall be filed as a separate pleading and clearly marked to the attention of the Managing Director. Any such request that is not filed as a separate pleading will not be considered by the Commission.[22]

Sirius followed this rule.

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20 *Modification Order*, 16 FCC Rcd at 5428.

21 47 C.F.R. § 1.1116(b).

22 47 C.F.R. § 1.1117(c).

The OMD's proffered reason for dismissing Sirius' request for reconsideration does not conform to the Commission's clear delegation of authority. The OMD claimed that Sirius first should have sought reconsideration with the International Bureau. However, the Commission's Rules delegate authority to consider petitions for reconsideration of fee determinations to the OMD, not the International Bureau.[23] The Commission's Rules further dictate that a petition for reconsideration of a fee determination filed with the International Bureau *will not be considered.* There is no provision in the Commission's Rules that permits the International Bureau to assume the OMD's responsibility for fee determinations in either the petition for waiver or the reconsideration context. An International Bureau fee determination would have been *ultra vires.* It is the obligation of the OMD—not the International Bureau—to address Sirius' *Petition*, and the OMD did so on June 4, 2001.

The Commission's Rules also require resolution of fee disputes independently of substantive proceedings. One of the Commission's guiding principles in implementing the fee collection program was that "the fee collection process should not have an adverse impact on the Commission's application processing and equipment authorization programs."[24] To this end, the rules expressly contemplate that fee disputes must be resolved by the OMD separately from the substantive processing of an application.[25] Moreover, Section 1.1116(b) of the Commission's

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[23] 47 C.F.R. § 0.231(a). At most, the International Bureau's statements regarding the applicable fee can be characterized as preliminary and, thus, not ripe for reconsideration in any event.

[24] *Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 2 FCC Rcd 947, 948 (1987) (Report and Order) ("*Fee Collection Order*") *recon. granted Establishment of a Fee Collection Program to Implement the Provisions of the Consolidated Omnibus Budget Reconciliation Act of 1985*, 3 FCC Rcd 5987 (1988) (Memorandum Opinion and Order).

[25] *Fee Collection Order*, 2 FCC Rcd at 957 (setting a policy of billing the applicant for insufficient payments discovered by the staff *after substantive processing had begun* and

Rules declares that, in the context of a pending fee dispute, a substantive decision stands, but is "contingent" on OMD's resolution of the collateral fee issue.[26] The Commission has consistently implemented the fee collection program as a collateral adjunct to its substantive rules that should not impair substantive grants of authority.[27] Accordingly, Sirius properly accepted its substantive grant of authority from the International Bureau and challenged the fee determination with the OMD.

B. Sirius' Petition Was Timely

Sirius timely sought reconsideration of the *OMD Fee Determination* by filing a petition with the OMD within thirty days of receiving the bill. In accordance with Section 1.1118 of the rules, Sirius cannot seek reconsideration of a fee determination until it pays the disputed fee. Section 1.1118(b) provides, in relevant part:

> (b) *reconsideration and/or review will only be available where the applicant has made the full and proper payment of the underlying fee as required by this subpart.*[28]

Petitions that are filed without the "full and proper fee payment will be dismissed."[29] Section 1.1118 thus confirms parties' affirmative right to petition for reconsideration or file an

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rejecting a policy of dismissing an application regardless of when a member of the staff discovers an insufficient fee payment).

26 Section 1.1116(b) reads, in pertinent part:

> Applications or filings accompanied by insufficient fees or no fees which are inadvertently forwarded to Commission staff for substantive review will be billed for the amount due if the discrepancy is not discovered until after 30 calendar days from the receipt of the application or filing at the Commission. . . . Any Commission actions taken prior to timely payment of this bill are contingent and subject to rescission.

27 The preference in the rules to resolve fee disputes independent of substantive issues is underscored by *Central Television v. FCC*, 834 F.2d 186, 190 (D.C. Cir. 1987), which prohibits an applicant from accepting in part and rejecting in part a license grant.

28 47 C.F.R. § 1.1118(b) (emphasis added).

application for review of an insufficient fee determination; that right, however, only attaches after the allegedly insufficient fee is paid.

The OMD's ruling that Sirius should have applied for reconsideration with the International Bureau before the fee determination had been made effectively rewrites the Commissions' rules in excess of its delegated authority and in violation of Sirius' due process rights. In this case, it was not possible for Sirius to pay the disputed fee—or seek reconsideration of the fee determination—until that determination, including the amount of fee owed, was made and billed by OMD. Section 1.1116(b) specifies that applicants will be "billed for the amount due if the discrepancy is not discovered until after 30 calendar days from the receipt of the application or filing at the Commission."[30] Section 1.1116(b) also permits the OMD to assess a 25 percent penalty along with the bill. Sirius had no way of knowing the extent to which the Commission would impose the penalty or offset prior fees paid for authority to launch and operate a Geostationary system ($39,600 for two satellites) and for authority to modify a LEO system ($22,010 per system) until it received the actual bill. The OMD issued the bill on June 4, 2001.

Section 1.1118(b) did not permit Sirius to challenge a fee by seeking reconsideration of the International Bureau's *Modification Order* by the April 9, 2001 deadline because the required fee had not been billed. Indeed, the amount was not yet known and, therefore, *could not be paid.* Rather the fee determination was not ripe on the deadline for filing for reconsideration of the *Modification Order*, and only became ripe after the *OMD Fee Determination*. The deadline for

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29 *Id.*

30 47 C.F.R. § 1.1116(b).

seeking reconsideration of that decision was July 5, 2001. Sirius filed on July 2, 2001, making its petition not only timely but three days early.

Despite this facial compliance with FCC Rules, the OMD rejected Sirius' request, because it was not filed by April 9, 2001, nearly two months before OMD billed Sirius. Under this bizarre reading of the rules, Sirius had no option. Rather, OMD's interpretation of the Commission's Rules creates a "Catch 22" situation wherein there is literally no time when Sirius could have sought reconsideration of the fee determination. Such an interpretation cannot be squared with the plain language of Section 1.1118(b), or the elemental requirements of due process and procedural fairness required by the Constitution and the Administrative Procedure Act ("APA").

Sirius therefore appropriately and timely filed for reconsideration of the OMD's fee determination, and the OMD committed a prejudicial procedural error in not reconsidering the appropriateness of the launch and operate fee.[31] For these reasons, the Commission should grant reconsideration of the launch and operate filing fee as applied to the *Sirius Modification Application.*

IV. THE OMD SHOULD HAVE RECONSIDERED THE LAUNCH AND OPERATE FEE, AND THE FCC SHOULD REVERSE THAT RULING

When considered on the merits, the 1998 *Sirius Modification Application* should have been categorized as a "modification," and reconsideration of the OMD's erroneous determination that Sirius should pay the fee for authorization to launch and operate a LEO system and refund of $286,095.00 are required. Placing an applicant in the proper fee category ensures that the applicant will pay its average share of the estimated processing costs for that type of application. When an applicant is miscategorized, however, the fee demanded is wholly divorced from the

[31] 47 C.F.R. § 1.115(b)(2)(v).

average share of the estimated processing costs that Congress intended that applicant to bear and the "fee" becomes a "tax," which the Commission may not levy.[32] The fee categories also ensure that similarly situated and potentially competing applicants do not gain relative advantage in the market by inconsistent assessment of fees by the Commission.

The Commission has no statutory authority to revise the statutory definition of fee categories to fit circumstances not contemplated by Congress. Congress established the metes and bounds of the application fee system, including the criteria for each of the various fee categories.[33] The Commission fulfilled its duty to implement the statutory system—not invent a separate framework—by issuing implementing regulations.[34] The OMD exceeded its statutory authority by deferring to an International Bureau determine to place Sirius' request for modification from a GSO to a non-GSO system, which clearly did not fit the statutory launch and operate criteria, into that category. This *ultra vires* action cannot be allowed to stand since it violates Due Process, conflicts "with statute, regulation, case precedent, [and] established Commission policy"[35] and involves "a question of law or policy which has not previously been resolved by the Commission."[36]

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32 *National Cable Television Ass'n. v. United States*, 415 U.S. 336, 342-44 (1974) (unconstitutional delegation of the Congressional taxing power may occur when an agency, without specific guidelines from Congress, charges fees that reflect the provision of public as well as private benefits); *National Cable Television Ass'n. v. FCC*, 554 F.2d 1094, 1108 (D.C. Cir. 1976). ("The fee schedule should be reasonably related to the individual cost of services as well as to the total costs for the particular segments of recipients. This is required so that the 'fee' does not become a 'tax.'").

33 *See Consolidated Omnibus Budget Reconciliation Act of 1985*, Pub. L. No. 99-272, 100 Stat. 82, 47 U.S.C. § 158 (1987).

34 *See Fee Collection Order*, 2 FCC Rcd at 947.

35 47 C.F.R. § 1.115(b)(2)(i).

36 47 C.F.R. § 1.115(b)(2)(ii).

The *Sirius Modification Application* cannot properly be categorized as an "Application for Authority to Launch and Operate." Careful review of both the *Sirius Modification Application* and the Commission's *Modification Order* confirms that Sirius neither sought nor received new authority to launch and operate:

- The *Sirius Modification Application* expressly sought FCC permission "*to modify* certain technical parameters of its space station authorization."[37]

- The file number assigned to the *Sirius Modification Application* and referenced in the *Modification Order* began with the designation "SAT-MOD", where "MOD" identifies the application type as a "[m]odification to a current license, authorization or accounting rate."[38] In contrast, the designation "LOA" would have been assigned if the International Bureau intended to issue Sirius new "[a]uthority to launch and operate a satellite space station."[39]

- The opening paragraph of the *Modification Order* unambiguously "grant[s] the application of Sirius...*to modify* its space station authorization" and the closing paragraph similarly "conclude[s] that the public interest is served by granting Sirius authority *to modify* its satellite system."[40]

- The International Bureau applied the standard of review for granting a modification, not new authority to launch and operate, to the *Sirius Modification Application*, explaining that it "often receives requests from licensees to modify the technical designs of their satellite systems during construction and implementation" and grants such requests to "allow the licensee to take advantage of the latest technology in providing service to the public."[41]

- The International Bureau did not undertake a new analysis of Sirius' baseline qualifications to hold an FCC license, nor did it require Sirius to submit information

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37 *Sirius Modification Application* (emphasis added).

38 *The New International Bureau File Number Format*, DA 98-1692 (Aug. 24, 1998) (Public Notice).

39 *Id.*

40 *Modification Order*, 16 FCC Rcd at 5419, 5417 (emphasis added).

41 *Id.*, 16 FCC Rcd at 5421 *quoting American Satellite Company*, 5 FCC Rcd 1186, 1186 (1990).

beyond that which is required to support a modification (*i.e.*, information that changed from its initial application and station license).[42]

- The International Bureau also did not undertake a new analysis of Sirius' technical qualifications. First, neither the spectrum allocation nor the exclusive, nationwide license (for which Sirius paid more than $83 million at auction) changed as a result of Sirius' request to deploy a geosynchronous, rather than a geostationary, satellite DARS system. Second, no additional *domestic* spectrum coordination was required—Sirius possesses exclusive rights to utilize the 2320.0-2332.5 MHz band. Third, the characteristics of Sirius' modified satellite communications system (*e.g.*, coverage area, EIRPs, G/T, transmission frequencies and transmission flux densities) remained virtually identical. Fourth, the number of satellites providing service at any given time remained the same (*i.e.*, two). Fifth, Sirius' system implementation schedule was not modified. Finally, although Sirius' modified system orbit is no longer geostationary, the average orbital altitude of its geosynchronous satellites is approximately the same as geostationary orbit satellites.

- Sirius' system, as modified, remains subject to the same milestone schedule imposed in its 1997 authority to launch and operate, not one that would be associated with a license to launch and operate space stations granted in 2001.[43]

In contrast to these undeniable facts showing that the Commission granted a "modification," the *Modification Order* provides no evidence—other than the unsupported paragraphs imposing the fee—that new "authority to launch and operate" was granted.

Indeed, any application for authority to launch and operate a new satellite DARS system would have been untimely because the auction that selected the satellite DARS licensees was completed on April 2, 1997.[44] In order to classify Sirius' application as an application for authority to launch and operate, the International Bureau would have had to, *nunc pro tunc*, convert the *Sirius Modification Application* into a new application to operate a satellite DARS

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[42] 47 C.F.R. § 25.117(d) ("Applications for modifications of space station authorizations shall be filed in accordance with § 25.114, but only those items of information listed in § 25.144(c) that change need to be submitted provided the applicant certifies that the remaining information has not changed."); *Sirius Modification Application*, at 5 ("CD Radio certifies that information not contained in Appendix A remains unchanged from CD Radio's prior submissions.").

[43] *Modification Order*, 16 FCC Rcd at 5431.

[44] *Sirius Order and Authorization*, 13 FCC Rcd at 7972.

system. But, when Sirius filed its modification, the DARS processing round had been closed for six years, and the auction was a year old. The Bureau could not have granted any new DARS application at that time, and did not do so. Thus, the grant of the *Sirius Modification Application* is itself the best evidence that no new authority was, or could have been, granted.

The OMD, however, misconstrued and erroneously dismissed Sirius' argument that "modification" is the proper fee category. The OMD asserts that "the Commission will not entertain arguments that a fee does not reflect the amount of actual effort expended by the Commission on a particular application or type of application."[45] Sirius does not seek a personalized fee determination, as alleged by the OMD, but rather placement in the proper fee category of "modification." It is simply that Sirius has shown that its application is properly classified as a modification—not an authorization to launch and operate—and therefore Sirius is entitled to reconsideration and a refund of the difference between the fee imposed and the fee that should have been assessed.

The OMD exceeded its statutory authority by placing Sirius' application for modification from a GSO to an NGSO system into the statutory launch and operate category since this determination conflicts with "statute, regulation, case precedent, [and] established Commission policy;"[46] and involves "a question of law or policy which has not previously been resolved by the Commission."[47] In these circumstances, reconsideration and a refund of the excess fees paid are required to rectify this *ultra vires* act and to preserve Sirius' rights to Due Process under the Constitution and the APA.

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45 *OMD Reconsideration/Waiver Denial* at 4.

46 47 C.F.R. § 1.115(b)(i).

47 47 C.F.R. § 1.115(b)(ii).

V. THE OMD SHOULD HAVE GRANTED SIRIUS A FEE WAIVER

Even if, on reconsideration, the Commission finds the launch and operate fee literally applies to the Sirius application, the OMD should have waived the fee, and the FCC should do so now. On authority delegated from the Commission, the OMD waives application fees where good cause is shown and the public interest would be served.[48] While administrative agencies may proceed by rules that block non-conforming applications, considerations of due process and equity require that, upon petition, the agency consider whether grant of a waiver would better serve the public interest than rejection of the application would: "It is well established that an agency's authority to proceed in a complex area . . . by means of rules of general application entails a concomitant authority to provide exemption procedures in order to allow for special circumstances."[49] The issue in each case is to determine where the public interest lies because an agency is under an "obligation to seek out the 'public interest' in particular, individualized cases."[50] Waiver is particularly appropriate here because the purpose of the rule would not be advanced by assessment of the launch and operate fee.[51] Under such circumstances, the Commission has no choice but to grant a waiver.[52]

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[48] 47 U.S.C. § 158(d)(2) ("The Commission may waive or defer payment of a charge in any specific instance for good cause shown, where such action would promote the public interest."); 47 C.F.R. § 1.1117(a) ("The fees established by this subpart may be waived or deferred in specific instances where good cause is shown and where waiver or deferral of the fee would promote the public interest."); *WAIT Radio v. FCC*, 418 F.2d 1153, 1157 (D.C. Cir. 1969), *aff'd*, 459 F.2d 1203 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1027 (1972).

[49] *United States v. Allegheny-Ludlum Steel Corp.*, 406 U.S. 742, 755 (1972). *See FPC v. Texaco, Inc.*, 377 U.S. 33, 40-41 (1964); *United States v. Storer Broadcasting Co.*, 351 U.S. 192, 204-05 (1956); *National Broadcasting Co. v. United States*, 319 U.S. 190, 225 (1943); *Southwest Pennsylvania Cable TV v. FCC*, 514 F.2d 1343, 1347 (D.C. Cir. 1975); *Community Service, Inc. v. United States*, 418 F.2d 709, 712 (6th Cir. 1969).

[50] *WAIT*, 418 F.2d at 1157.

[51] The Commission has emphasized "that the very core of [the fee collection] effort is to reimburse the government -- and the general public -- for the regulatory services provided to certain members of the public." Fee Collection Order, 2 FCC Rcd at 948. As discussed in

In this situation, good cause exists to waive the fee for an application for "authority to launch and operate" a LEO satellite system. The extraordinary circumstances surrounding Sirius' *Petition* support waiver of the fee for an application for "authority to launch and operate" a LEO satellite system. The Commission has never before considered an application to modify a GSO system to a NGSO system, and the fee rules do not explicitly address that circumstance. The fee rules only contemplate two categories of applications—authority to launch and operate and modification. Even if the Commission does not agree with the wealth of evidence supporting the classification of Sirius' application as a modification,[53] the application is at most something between a modification and a request to launch and operate, something clearly not previously contemplated by Congress or the Commission. Congress set forth the statutory framework for the fee regulations and delegated authority to the Commission for their implementation. Pursuant to 47 C.F.R. § 1.115(b)(2)(v), where Congress has given no guidance as to how to classify an application under these circumstances, the Commission must grant a waiver rather than arbitrarily placing Sirius in a fee category that is at best a poor fit and illogical in the procedural context of the *Sirius Modification Application*.[54]

Section IV, *supra*, where no existing statutory fee category is fully consistent with the application request, the fee demanded is wholly divorced from the average share of the estimated processing costs that Congress intended that applicant to bear, and the purpose of the rule is not met.

[52] *Arlington Telecommunications Corporation d/b/a ARTEC*, 70 F.C.C.2d 2291, 2298 (1979) (Memorandum Opinion and Order) ("*ARTEC III*") ("When an applicant for waiver admits the applicability of a rule but introduces evidence in the course of an adjudication showing that the rule's purpose is not served by applying it to its particular circumstances, the agency has no legal alternative but to waive the rule in most cases.").

[53] *See supra* Section IV.

[54] 47 C.F.R. § 1.115(b)(2)(v). As discussed in Section IV, *supra*, the International Bureau could not have granted new authority to launch and operate in the *Modification Order* in 2001 because the auction for satellite DARS licensees was completed in 1997.

At the time of the *Sirius Modification Application*, even greater ambiguity existed because the only two categories were GSO space stations and LEO satellite systems.[55] An inclined, elliptical geosynchronous system, as proposed by Sirius in its application for modification, did not fit neatly into either category. It was neither a GSO system, because it was inclined and elliptical, nor a LEO system, because its average altitude was not "low," but approximately equal to that of a GSO system.[56]

The purposes of the fee statute and rules would not be advanced by denying the waiver. Sirius paid what it believed in good faith to be the appropriate fee. The sufficiency of that fee only became an issue after its direct competitor, XM, improperly suggested to the International Bureau that Sirius should pay the fee for authority to launch and operate a LEO satellite system.[57] In any case, Congress has not legislated that the fee for authorization to launch and operate a LEO system should be paid when modifying a GSO system to a non-GSO system, and the Commission's Rules do not dictate such a result. In a case such as this, where the purpose of the fee rules would not be advanced by assessing the higher fee and the circumstances of the instant application clearly were not contemplated by either Congress or the Commission, a waiver of the launch and operate fee is required.[58]

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55 *See supra* note 6.

56 Sirius' proposed system bore some of the characteristics of a typical GSO system—similar average altitude and limited number of satellites—but also possessed certain characteristics of a LEO system—non-zero inclination and elliptical orbit.

57 XM radio's suggestion was procedurally improper as contrary to Section 1.1117 of the Rules. *See supra* note 8.

58 Sirius does not dispute that it would be preferable for the fee statute to address the circumstance of modifying a GSO to a non-GSO system. In the absence of Congressional authorization and considering the unusual procedural posture of Sirius' *Petition*, a waiver of the launch and operate fee clearly is warranted.

The OMD failed to consider these circumstances and, as a result, improperly concluded that the remainder of Sirius' public interest arguments were insufficient for a waiver. When viewed *in toto* with the extraordinary posture of the *Sirius Modification Application*, however, these public interest benefits justify waiver. The Commission has concluded that satellite DARS will "yield substantial [public] benefits."[59] For example, the Commission has acknowledged that satellite DARS will "offer high quality radio signals to listeners who currently receive few radio signals."[60] Moreover, with its national reach, satellite DARS will "complement terrestrial radio"[61] by "provid[ing] new services that local radio inherently cannot provide...[such as] continuous radio service to the long-distance motoring public...and...new forms of emergency services."[62] It will also bring service to underserved rural communities, minorities and ethnic groups.[63] Most recently, the Commission "conclude[d] that the public interest is served by granting Sirius authority to modify its satellite system."[64] The *Sirius Modification Application* undertook technical changes better to fulfill these objectives.

The public interest also is served by the fair and consistent application of the Commission's fee rules. Although the fee rules are designed to reimburse the government and

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59 *Establishment of Rules and Policies for the Digital Audio Radio Satellite Service in the 2310-2360 MHz Frequency Band*, 12 FCC Rcd 5754, 5762 (1997) (Report and Order, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking).

60 *Id.*, 12 FCC Rcd at 5759.

61 *Id.*, 12 FCC Rcd at 5756.

62 *Id.*, 12 FCC Rcd at 5760-761.

63 *Sirius Order and Authorization*, 13 FCC Rcd at 7971 ("satellite DARS will offer niche programming that will serve listeners with special interests. In addition, SDARS has the technological potential to provide a wide range of audio programming options to rural and mountainous sections of the country that have historically been underserved by terrestrial radio").

64 *Modification Order*, 16 FCC Rcd at 5429.

the general public for the regulatory services provided by the Commission, the various fee categories ensure that there is at least some correlation between the average processing costs for a category of applications and the cost levied upon an individual application. The fee categories ensure that similarly situated and potentially competing applicants do not gain relative advantage in the market by inconsistent assessment of fees by the Commission. The imposition of an unlawful and inequitable fee of more than three hundred thousand dollars just as Sirius is on the cusp of offering significant public benefits for the first time creates such a relative advantage for Sirius' competitor and would be a disservice to the public. It is particularly unjustified where, as here, assessment of the launch and operate fee was first raised by that competitor for purely self-interested reasons and in violation of the Commission's Rules. The public interest therefore would be served by waiver of the launch and operate fee, which would prevent improper application of the Commission's fee schedule from hindering the deployment of this valuable service at a critical juncture.

VI. CONCLUSION

The *OMD Reconsideration/Waiver Denial* works a gross miscarriage of justice by improperly sidestepping its sole responsibility to reconsider, or waive, fees and by preventing applicants from *ever* seeking review of additional fees assessed after grant of a license modification. Neither the statute nor the FCC's Rules permit such a cavalier disregard of Due Process or the APA. Sirius respectfully requests that the FCC reconsider the *OMD Fee Determination* that placed the *Sirius Modification Application* in the launch and operate fee category or grant Sirius a fee waiver. In either case, the Commission should refund the improperly billed fee of $286,095.00 to Sirius.

Respectfully submitted,

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March 15, 2002

CERTIFICATE OF SERVICE

I, Christopher E. Ryan, a legal assistant at Wiley Rein & Fielding LLP, hereby certify that on March 15, 2002, I caused copies of the foregoing **Application for Review** to be served by hand-delivery on the following parties:

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